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### Principled Humanitarian Organizations and the Use of Force: Is There Space to Speak Out?

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## Principled Humanitarian Organizations and the Use of Force: Is There Space to Speak Out?

### Cover Page Footnote

This article reflects the views of the authors, and does not represent the views of their employers.

## ***Abstract***

Humanitarian organizations are fundamentally concerned with addressing the suffering of civilians. The decision by an armed actor to resort to force can result in greater protection or greater harm, and this decision has at least as significant an impact on civilian lives as any decision made during the conduct of hostilities. Yet, humanitarian organizations rarely publicly advocate for or against the use of force. This article explores the perceived and actual limitations that humanitarian principles place on the public advocacy of humanitarian organizations regarding the recourse to force. It begins with a discussion of the relevant legal framework and explication of the fundamental humanitarian principles. It then goes on to discuss the political and operational implications for humanitarian organizations that choose to speak out, and outlines the issues that these organizations may consider when choosing to adopt a public position on the use of force.

## **I. Introduction**

Humanitarian organizations play a central role in addressing the urgent needs of the civilian population during armed conflict. Operating frequently in highly insecure environments, these organizations run programming designed to meet the basic needs of civilians, who most often bear the brunt of hostilities. Central to the mission and echoed in the mandate of most of these organizations is the guiding force of the humanitarian principles.

The term “humanitarian principles” is used by different actors, all with varying goals, to refer to a variety of values and norms. In the context of the provision of humanitarian assistance during armed conflict, there are four main principles that fall under this heading: humanity, neutrality, impartiality, and independence.<sup>1</sup> Though international humanitarian law (“IHL”), the legal framework that applies to situations of armed conflict, makes explicit reference only to humanity and impartiality, treaty commentary and general practice reference all four principles. Subsidiary to these four main principles are those of voluntary service, unity, and universality; all of these principles are found in the Fundamental Principles of the International Red Cross and Red Crescent Movement.<sup>2</sup> Although these four fundamental principles are specific to the movement itself, they have been widely adopted by numerous humanitarian organizations and have been reaffirmed in United Nations Resolutions, industry codes of conduct, and best practices.<sup>3</sup>

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<sup>1</sup> See, e.g., Elizabeth Ferris, *The Politics of Protection: The Limits of Humanitarian Action*, at 11(2011).

<sup>2</sup> Fundamental Principles of the International Red Cross and Red Crescent Movement, Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross, Geneva (1986), available at <https://www.icrc.org/eng/resources/documents/red-cross-crescent-movement/fundamental-principles-movement-1986-10-31.htm>.

<sup>3</sup> The four main principles were articulated at the 20th International Conference of the Red Cross in 1965 and subsequently reaffirmed in the Statutes of the International Red Cross and Red Crescent Movement, adopted in 1986. See *The Fundamental Principles of the International Red Cross and Red Crescent Movement* (1986), available at <https://www.icrc.org/eng/resources/documents/red-cross-crescent-movement/fundamental-principles-movement-1986-10-31.htm>. See also A. Res. 46/182 (1991); G.A. Res. 58/114 (adopted Dec. 17, 2003) (dist. Feb. 5, 2004). They are also found in the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief. See *generally* Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief (1994), available at <https://www.icrc.org/eng/resources/documents/publication/p1067.htm>.

For organizations that commit to act in accordance with the main humanitarian principles, these principles guide many important legal, policy, and operational decisions. Strict adherence to the principles can be challenging, particularly in the often politically charged and volatile conditions of armed conflict. Nonetheless, observance of these principles is important for a number of reasons. Organizations that are humanitarian and impartial benefit from a privileged position under IHL, and as such, their offers of assistance are not to be regarded as interference in the sovereign affairs of a state. Organizations that act in accordance with the principles may benefit from an advantageous negotiating position vis-à-vis parties to the conflict when trying to obtain access to the civilian population. Similarly, adherence to the principles is often important for ensuring staff and beneficiary safety, which is fundamental to stable and predictable programming. Lastly, these principles are critical to perceptions of the organizations; actors – particularly parties to the conflict – are often more inclined to allow access to civilians if the parties view the humanitarian organization as acting in accordance with the principles of neutrality, independence, and impartiality.

In the course of their efforts, humanitarian organizations rarely make public statements supporting or opposing the use of force by a single actor (whether it is a state, armed group, regional body, or the United Nations) in an actual or putative armed conflict (though it is not unusual for humanitarian organizations to generally promote peaceful conflict resolution and call on all parties to agree to ceasefires).<sup>4</sup> This reticence is not a matter of legal obligation, but may be a consequence of the organization's commitment to principled action – in particular its commitment to neutrality. What follows is an examination of whether this silence is required by the humanitarian principles, and if a humanitarian organization may still publicly support or oppose the use of force by an armed actor while remaining faithful to the principles (both in terms of an organization's self-identification and others' perceptions of the organization). Section II of this Article situates the humanitarian principles within the framework of international law and humanitarian practice and discusses the reasons that organizations choose to comply with them. Section III, outlines the implications of taking a public position on the recourse to force for each of the four fundamental humanitarian principles and concludes that only the principle of neutrality may require silence on the use of force by a single armed actor. Section IV articulates some of the considerations that humanitarian organizations may take into account when deciding whether or not to speak out on the use of force. The article ends by concluding in Section V that while public advocacy for or against the use of force may be morally compelling in some situations, the considerations outlined in Section IV, considered together with operational challenges and risks to programs, partners, and staff make it particularly difficult for humanitarian organizations to adopt a public position.

## II. Humanitarian Principles and International Humanitarian Law

It is important to begin with an understanding of the relationship between the humanitarian principles, humanitarian assistance in armed conflict, and IHL. IHL is the legal framework applicable to international and non-international armed conflict. It is understood as

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<sup>4</sup> Our discussion of the use of force in this Article relates exclusively to calls on a single party or a single side in a particular situation, rather than calls on all sides to end or refrain from engaging in combat. *See, e.g. 34 organizations call for a ceasefire and sustained solution towards peace*, (11 July 2014) available at <http://mcc.org/sites/mcc.org/files/media/common/documents/34organizationscallforceceasefire.pdf>.

[I]nternational rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict.<sup>5</sup>

The primary treaties that serve as the foundation of the legal framework are the four Geneva Conventions and their first two Additional Protocols.<sup>6</sup> Other treaties that proscribe specific weapons or means and methods of warfare also form the basis of IHL. Customary international humanitarian law (“CIHL”) is likewise important for the regulation of the behavior of the parties to a conflict.<sup>7</sup> Specific IHL treaties may apply only to international or non-international armed conflicts; however, many of the rights, responsibilities, and obligations enshrined in treaties may nonetheless be applicable to both international and non-international armed conflict as rules of CIHL. For instance, it is widely accepted that under CIHL

[P]arties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.<sup>8</sup>

Though the obligation to allow and facilitate humanitarian access in the event of demonstrable need on the part of the civilian population (subject to security considerations) appears in the Fourth Geneva Convention, Additional Protocol I (applicable to international armed conflict),<sup>9</sup> and Additional Protocol II (applicable to non-international armed conflict),<sup>10</sup> in a number of contemporary conflicts these treaty provision would have been inapplicable.

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<sup>5</sup> Yves Sandoz, Christophe Swinarski, & Bruno Zimmerman (eds.), *Commentary - Introduction to the Commentary on the Additional Protocols I and II of 8 June 1977*, p. xxvii (1987).

<sup>6</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]. The third Protocol is not relevant to this examination but for the sake of completeness is cited here. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005, 2404 U.N.T.S. 1.

<sup>7</sup> See Statute of the International Court of Justice (hereinafter ICJ), Art. 38.

<sup>8</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law*, Rule 55 (2005).

<sup>9</sup> See, e.g., Arts. 23, 59 Fourth Geneva Convention 75 U.N.T.S. 287; Art. 70, Additional Protocol I 1125 U.N.T.S. 3.

<sup>10</sup> See Art. 18, Additional Protocol II 1125 U.N.T.S. 609.

Take the case of Syria, which has recently witnessed a non-international armed conflict (as well as arguably a concomitant international conflict). Conduct relating to the non-international conflicts in Syria is not governed by the Fourth Geneva Convention, which applies only to international conflicts, or by Additional Protocol II,<sup>11</sup> to which Syria is not a State Party.<sup>12</sup> However, many of the provisions found in Additional Protocol II, including those related to humanitarian assistance, are reflected in rules of CIHL.<sup>13</sup> Thus, the parties to the conflict are bound by much of what is found in Additional Protocol II, but the legal obligation is based on its status as rules of CIHL rather than its status as treaty law. Consequently, when determining rights, responsibilities, and obligations in the context of IHL, both treaty and customary law are appropriate sources of authority for determining the rules that regulate the behavior of both states and non-state armed groups during armed conflict.

Under IHL, humanitarian assistance is generally defined in a narrow manner, and is understood to include relief that is focused on basic, life-saving materials such as; food, medical supplies, and shelter.<sup>14</sup> Central to the provision of such assistance is the notion of predictable, sustainable, and safe access to the civilian population being served. Such access is considered to be a “fundamental prerequisite for humanitarian action and protection[;] and for millions of vulnerable people caught in conflicts it is often the only hope and means of survival.”<sup>15</sup> Engagement with the parties to the conflict who control access to the territory where the beneficiary communities are located is critical to the efforts of the United Nations (“UN”), the International Committee of the Red Cross (“ICRC”), and non-governmental organizations (“NGO”) seeking to provide humanitarian assistance.

Parties to the armed conflict decide whether to grant access to humanitarian organizations based on a mélange of legal, policy, and ethical considerations. Central among these considerations is whether an organization’s sole motive is to help the civilian population. Another important consideration is whether granting access would yield a military advantage to the adversary. Publicly declaring allegiance to humanitarian principles – and acting demonstrably in concert with them – helps humanitarian actors make their case for humanitarian access. However, adherence to the principles is not straightforward, and can be fraught with apparent contradictions. How these principles are conceptualized by law provides understanding for how humanitarian actors can operationalize them in practice to resolve these apparent contradictions.

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<sup>11</sup> See common Art. 2 and common Art. 3 of all four Geneva Conventions for the material scope of the Geneva Conventions.

<sup>12</sup> For a list of states parties see ICRC, *Treaties and State Parties to Such Treaties*, available at [https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=475](https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475).

<sup>13</sup> See, e.g., Additional Protocol II, Art. 18(2) (“If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.”).

<sup>14</sup> See, e.g., Fourth Geneva Convention, Art. 55 (referring to “necessary foodstuffs, medical stores”); Additional Protocol I, art. 69 (listing “clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population”), Additional Protocol II, art. 18 (referring to “supplies essential for its survival, such as foodstuffs and medical supplies”).

<sup>15</sup> U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*: Rep. of the Secretary-General, S/2010/579 (Nov. 11, 2010).

It is important to note that humanitarian organizations such as Médecins Sans Frontières, Save the Children, Mercy Malaysia, and Oxfam are not bound by IHL. Similarly, the seven Fundamental Principles of the Red Cross and Red Crescent Movement are compulsory only for those national societies.<sup>16</sup> Strictly speaking, humanitarian organizations are not bound by IHL and are therefore not under a legal obligation to adhere to these principles;<sup>17</sup> any commitments by organizations to do so are not legally enforceable under international law. It follows that no NGO is legally obligated to remain silent on the use of force by an armed actor.

Notwithstanding the fact that humanitarian organizations (apart from the ICRC and National Movement) are not legally bound to adhere to the humanitarian principles, these same organizations undoubtedly have significant incentive to abide by them.<sup>18</sup> Under IHL, the activities these organizations seek to undertake are privileged as humanitarian relief if they are “humanitarian and impartial in character and conducted without any adverse distinction.”<sup>19</sup> Furthermore, humanitarian organizations generally must maintain their impartial character in order to retain the privileges bestowed upon “impartial humanitarian organization[s]” that are referenced numerous times in the four Geneva Conventions.<sup>20</sup> These provisions push organizations to be impartial and humanity-driven, in large part due to their inherent normative appeal and the practical benefits of the legal privileges enjoyed by organizations that meet the conditions. However, the strongest reasons for an organization to abide by its commitments to humanitarian principles may be operational. Delivering humanitarian assistance in a principled fashion is critical for both operational security (in terms of staff and beneficiary safety) and operational effectiveness (in terms of program sustainability and predictability).

Since humanitarian organizations *act* in a principled manner for both principled and pragmatic reasons, it is impossible to discern from their conduct alone why so many of them categorically abstain from publicly supporting or opposing the use of force by an armed actor. They may believe that their commitments to humanitarian principles require their abstention or they may believe it is simply expedient and practical to do so in order to ensure there are no risks to their operations. It is also possible that organizations simply do not confront the question, given the general thrust of humanitarian principles and the risk to programs and staff sometimes associated with taking on controversial issues.

Yet, the decision to use military force by an armed actor is often the most consequential of all for civilians that are or would be affected by armed violence. The humanitarian imperative may actually compel principled organizations to speak out either for, or against military action – if they were not inhibited by other legal or ideological commitments or their operational realities.

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<sup>16</sup> The International Committee of the Red Cross is unique in so far as it is endowed with legal personality under international law. See, e.g., Gabor Rona, *The ICRC's status: in a class of its own* (2004) available at <https://www.icrc.org/eng/resources/documents/misc/5w9fjy.htm>.

<sup>17</sup> NGOs are not subjects of international law, and therefore, are not bound by international law. See, e.g., Boleslaw Adam Boczek, *International Law: A Dictionary*, at 76 (2005).

<sup>18</sup> To the extent any such commitment is made in the context of a contract with a donor or grantor, there could exist an argument that there is a legal basis for such an obligation. Such a basis, however, is grounded in contract law and not IHL.

<sup>19</sup> Art. 70, Additional Protocol I.

<sup>20</sup> See, e.g., The “right of initiative” under Common Art. 3 of the Geneva Conventions.

To that end, an understanding of what humanitarian principles actually require of their adherents is long overdue.

### A. Humanity

Humanity is defined as the imperative to “prevent and alleviate human suffering wherever it may be found.”<sup>21</sup> The underlying purpose of the principle is to “protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.”<sup>22</sup> It is linked closely to the qualifier “humanitarian” in the context of organizations providing relief within the framework of IHL. Humanitarian is described in the Commentaries to the Geneva Conventions as “being concerned with the condition of man considered solely as a human being, regardless of his value as a military, political or professional or other unit.”<sup>23</sup> It refers more to the motivation for offering assistance, rather than the manner in which the assistance is carried out.<sup>24</sup>

In the seminal case *Nicaragua v. United States* before the International Court of Justice, the Court endeavored to delineate what would be considered humanitarian assistance under international law. The Court stated

An essential feature of truly humanitarian aid is that it is given ‘without discrimination’ of any kind. In the view of the Court, if the provision of ‘humanitarian assistance’ is to escape condemnation as an intervention in the internal affairs of [a country], not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely ‘to prevent and alleviate human suffering,’ and ‘to protect life and health and ensure respect for the human being’; it must also, and above all, be given without discrimination to all in need [in the country], not merely to one [side] and their dependents.<sup>25</sup>

This description has been criticized, however, as failing to account for the nature of humanitarian principles and the operational realities in which they are exercised.<sup>26</sup> Generally speaking, neither the principles of neutrality or impartiality, nor state practice, require that assistance be provided to all sides in a conflict for the assistance to be deemed humanitarian, since organizations may find that civilians on one side are in greater need or easier to access. Thus, the principle of humanity and the humanitarian character of humanitarian assistance must be assessed in the context of other humanitarian principles and the practical obstacles that organizations face.

<sup>21</sup> The Fundamental Principles of the International Red Cross and Red Crescent Movement, *supra*, note 2.

<sup>22</sup> *Id.*

<sup>23</sup> Jean S. Pictet, Commentary at 96, available at <https://www.icrc.org/ihl/COM/380-600013?OpenDocument>

<sup>24</sup> Mackintosh, *The Principles of Humanitarian Action in International Humanitarian Law*, HPG Report, at 7 (Mar. 2000).

<sup>25</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits), I.C.J. Reports 243 (27 June 1986).

<sup>26</sup> See, e.g., Kalshoven, *Impartiality and Neutrality in Humanitarian Action*, 29 International Review of the Red Cross (Dec. 1989); Mackintosh, *The Principles of Humanitarian Action in International Humanitarian Law*, HPG Report (Mar. 2000).



## B. Impartiality

An impartial organization “makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavors to relieve the suffering of individuals, being guided solely by their need, and to give priority to the most urgent cases of distress.”<sup>27</sup> The principle of impartiality requires that assistance be provided based on need and priority alone and not “prejudice . . . [or] considerations regarding the person . . . to whom he gives or refuses assistance.”<sup>28</sup> This principle encompasses three elements.<sup>29</sup> The first is the concept of non-discrimination, which requires that no adverse distinction be made on such grounds as nationality, race, religion or political affiliation. The second is proportionality, which requires that assistance be provided based on need alone. Last is the concept of “impartiality proper” which demands that those providing assistance make no subjective distinction; meaning all those in need are “equally entitled to help, whether they are good or bad, innocent victims or persons guilty of hideous war crimes.”<sup>30</sup> It is understood that if programming is undertaken in only a specific area due to operational limitations, the principle of impartiality is not necessarily violated; but “the aspirations the principles . . . must continue to be implemented to the maximum extent.”<sup>31</sup> This demonstrates that just as the principle of humanity is defined in relation to impartiality, the reverse is equally true.

## C. Independence

Independence in the context of humanitarian action requires that the organization remain autonomous from any “political, economic, military or other objectives any actor may hold with regard to areas where humanitarian action is being implemented.”<sup>32</sup> The principle has been described in the context of the ICRC as requiring that the ICRC “be sovereign in its decisions, acts and words . . . it is not admissible for any power . . . to make it deviate from the line established for it by its ideals.”<sup>33</sup> The principle has serious consequences for operations as it requires that organizations not allow their activities to be affected by funding considerations, political concerns, or military goals. Demonstrable independence from donors (and political, economic or military goals of donors) and operational transparency are critical to establishing an organization’s independence.

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<sup>27</sup> The Fundamental Principles of the International Red Cross and Red Crescent Movement, *supra*, note 2.

<sup>28</sup> Jean S. Pictet ed., *Commentary: Convention (II) Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, (Geneva: International Committee of the Red Cross, 1960), 68-69.

<sup>29</sup> See Kalshoven, *supra* note 26, at 520; The Fundamental Principles of the International Red Cross and Red Crescent Movement (1986), *supra* note 2; Françoise Bouchet-Saulnier, *The Practical Guide to Humanitarian Law*, 218-19 (2007).

<sup>30</sup> Kalshoven, *supra* note 26, at 520.

<sup>31</sup> *Id.*

<sup>32</sup> G.A. Res. 58/114, *supra* note 3. See also, World Humanitarian Summit, 23 Principles and Good Practice of Humanitarian Donorship, 2003 (endorsed 17 June 2003) available at <http://www.worldhumanitariansummit.org/node/434472>; Bouchet-Saulnier, *supra* note 29, at 218.

<sup>33</sup> Denise Plattner, *ICRC Neutrality and Neutrality in Humanitarian Assistance*, International Review of the Red Cross 4 (Apr.1996).

## D. Neutrality

Neutrality is understood in the context of humanitarian assistance as requiring an organization to abstain from “[taking] sides in hostilities or [engaging] at any time in controversies of a political, racial, religious or ideological nature” so as to “continue to enjoy the confidence of all [the parties to a conflict.]”<sup>34</sup> Critical to the principle of neutrality is “getting the parties to the conflict to accept that, by nature, relief actions are not hostile acts, nor are they de facto contributions to the war efforts of one of the belligerents.”<sup>35</sup>

The principle has also been described as “a necessary negative complement to the essentially positive notion of impartiality.”<sup>36</sup> It has a dual meaning in so far as it precludes an organization from engaging in hostilities (directly or indirectly) in favor of either side (military neutrality), and prohibits an organization from engaging in controversies of a political, racial, religious, or ideological nature (political neutrality).<sup>37</sup>

It may be understood as an operational principle that is a means to an end, rather than an end in itself.<sup>38</sup> This is because the objective of staying distant from contending parties or ideologies is so that the parties will trust the organization, which is critical to being able to operate safely, effectively and predictably.<sup>39</sup>

The principle of neutrality has evolved to arguably allow for the denunciation of serious violations of IHL.<sup>40</sup> It is suggested that such public statements are not to be viewed as engagement of a political or ideological nature in the conflict, and as such are exempt from the restrictions of the principle of neutrality. As explained by one author, “[h]ardly a burden, neutrality is instead viewed as truly liberating. Since no belligerent is beyond reproach, neutrality allows criticism of whatever side requires it.”<sup>41</sup> It allows for a principled position to be retained amidst highly politicized conditions.

Despite its centrality to humanitarian action in practice and popular imagination, neutrality is not referenced in the text of the Geneva Conventions. Furthermore, there are a number of organizations considered to be humanitarian organizations that do not subscribe to this principle. For example, Oxfam does not subscribe to the principle of neutrality as it is commonly understood and described in this article.<sup>42</sup> In accordance with its “rights-based approach” to humanitarian assistance, Oxfam views confrontations with injustice, however politically controversial, to be central to its humanitarian mission. Oxfam is also wary of the possibility

<sup>34</sup> The Fundamental Principles of the International Red Cross and Red Crescent Movement, *supra*, note 2.

<sup>35</sup> Bouchet-Saulnier, *supra* note 29, at 219.

<sup>36</sup> Kalshoven, *supra* note 26, at 520.

<sup>37</sup> Plattner, *supra* note 33, at 4.

<sup>38</sup> Larry Minear, *The Theory and Practice of Neutrality: Some Thoughts on the Tensions*, 830 International Review of the Red Cross 3 (31 Mar. 1999); Bouchet-Saulnier, *supra* note 29, at 220.

<sup>39</sup> See Marion Harroff-Travel, *Neutrality and Impartiality - The Importance of these Principles for the International Red Cross and Red Crescent Movement and the Difficulties Involved in Applying Them*, 29 International Committee of the Red Cross 537 (Dec. 1989).

<sup>40</sup> See, e.g., Bouchet-Saulnier, *supra* note 29, at 219.

<sup>41</sup> Minear, *supra* note 38, at 3; Bouchet-Saulnier, *supra* note 29.

<sup>42</sup> Oxfam’s Role in Humanitarian Action (2013), available at <https://www.oxfam.org/sites/www.oxfam.org/files/hpn-role-humanitarian-action-010613-en.pdf>

that silence or attempts at even-handedness in controversial debates might be perceived by beneficiaries as complicity or indifference to injustice – precisely the sort of perception that neutrality is meant to avoid.

### **III. Implicating Humanitarian Principles by Speaking Out**

Given that the use of force by States and armed groups significantly impacts civilians, it is understandable that humanitarian organizations (whether neutral or non-neutral) might feel compelled to speak out publicly – either in favor of, or against the use of force. In so doing, humanitarian organizations must tread carefully to maximize their positive impact on civilians while maintaining their adherence to the humanitarian principles.

#### **A. Implications for the Principle of Humanity**

In considering whether to adopt a public position vis-à-vis the use of force by an actor, an organization must be cautious not to jeopardize its privileged position under IHL. It is difficult to imagine a realistic scenario in which a humanitarian organization violates the principle of humanity by coming out against the use of force. Some accounts of the principle of humanity suggest that it also incorporates the “do no harm” principle imported from medical ethics.<sup>43</sup> It is important to note that most scholarly literature on “do no harm” in the humanitarian context focuses on the net creation of harm by aid workers, most notably by fueling and perpetuating conflict – in other words, aid interventions that failed to “do less harm.”<sup>44</sup>

More relevant to this analysis is whether the principle of humanity permits *support* for harmful means to achieve a net reduction and prevention of suffering for the civilian population. Given the common practice of carrying out programs that put staff or partners at risk, or that carry a non-negligible risk of aid diversion to armed groups, “do no harm” probably does not mean, “do not take any action that is likely to result in harm,” but rather “do less harm.” Therefore, there may be circumstances under which a humanitarian organization might publicly support or oppose the use of force while not running afoul of the principle of humanity. Indeed, an organization’s own interpretation of the principle may, in the context of its other commitments, strongly compel it to take a public position.

#### **B. Implications for the Principle of Impartiality**

The principle of impartiality is fundamentally operational in nature; and as such, public statements for or against the use of force may have consequences for an organization’s reputation as an impartial actor, but it is unlikely that adopting such a position would violate an organization’s impartiality. A humanitarian organization, whether it is a neutral or non-neutral, may make a statement as to whether it thinks the use of force is advisable while still conducting relief operations in a manner that is non-discriminatory, proportional to the demonstrated need of the beneficiaries, and free of any subjective distinctions concerning those receiving the assistance. Thus, to the extent that an organization must consider implications for the principle

<sup>43</sup> See *UNICEF’s Humanitarian Principles*, UNICEF (July 2003).

<sup>44</sup> See, e.g., *UNICEF’s Humanitarian Principles*; Jennifer Rubenstein, *Between Samaritans and States: The Political Ethics of Humanitarian NGOs*, Oxford (2015).

of impartiality, its primary concern would likely be whether actors – specifically parties to the conflict – still *perceive* the organization as acting impartially.

### C. Implications for the Principle of Independence

The principle of independence may be compromised if a humanitarian organization, by adopting a public position concerning the use of force, does so as a result of being influenced by the political, military, or financial motivations of a third party. This becomes particularly acute if a state is a key donor of that organization. If a humanitarian organization (neutral or non-neutral) takes a public position on the use of force, and does so independent of any influence from a state, then strictly speaking, the principle of independence is not compromised. Whether the principle of independence is technically respected is of course important, but perhaps even more so is the issue of whether a humanitarian organization is *perceived* as acting independently. As a result, even if a humanitarian organization is not allowing itself to be influenced by a third party, it should still consider whether they *appear* to be swayed in any way when adopting a public position concerning the use of force. Transparency in terms of the grounds for adopting such a position would be important in demonstrating freedom from any outside pressure.

### D. Implications for the Principle of Neutrality

For humanitarian organizations that have adopted the principle of neutrality, taking a public position concerning the use of force puts their adherence to the principle at risk. With the notable exception of the ICRC,<sup>45</sup> the consequences of violating the principle of neutrality are not legal, but political and operational. Supporting or opposing the use of force would likely always align a humanitarian organization with one side of a conflict, violating the ideological prong of the neutrality principle. This could compromise the organization's reputation and its ability to conduct effective relief operations. However, if communities served by humanitarian organizations are widely in favor or opposed to the use of force, an organization may actually enhance its reputation and strengthen its case for acceptance by speaking out.

The principle of neutrality is not tantamount to a requirement of silence and does not require that its adherents remain quiet in all circumstances. As one author explained “[neutrality] means keeping quiet when to say anything would inflame passions and provide material for propaganda without doing any good to the victims [that the organization] is trying to help.”<sup>46</sup> Neutrality requires that an organization remain neutral as to the parties involved in the conflict – but not to the suffering the organization is trying to combat.<sup>47</sup> The rarity with which the ICRC makes

<sup>45</sup> The ICRC statute, an international agreement, commits it to neutrality.

<sup>46</sup> Harroff-Tavel, *supra* note 39, at 540.

<sup>47</sup> *Id.* at 539. The ICRC does, however, publicly denounce violations of IHL on occasion. Four conditions have been named as needing to be fulfilled before the ICRC will consider such a public statement:

1. The violations (torture, bombing of shelling of civilians, attacks on refugee camps, attacks on hospitals or Red Cross/Red Crescent personnel, etc.) are major and repeated;
2. The steps taken confidentially [by the ICRC] have not succeeded in putting an end to the violations;
3. Such publicity is in the interest of the persons or populations affected or threatened;
4. The ICRC delegates have witnessed the violations with their own eyes, or the existence and extent of those breaches were established by reliable and verifiable sources.<sup>47</sup>

pronouncements concerning violations of IHL is notable, and has been criticized as unacceptable silence in the face of egregious violations of IHL.<sup>48</sup> The ICRC explains that its infrequent use of public statements is twofold: “it does not want to risk losing its access to the victims of conflict by doing so, and it has reservations about the extent to which public declarations can mobilize opinion.”<sup>49</sup>

While the principle of neutrality does not demand silence, it may not permit humanitarian organizations to adopt a position on the use of force. As a threshold matter, the neutral organization must first determine if taking such a position would fundamentally align it with the military interests of one party or another. It is almost impossible to envision a scenario in which supporting one party’s use of force would not result in the support of that party’s military objective, and conversely, it seems equally unlikely to conceive a scenario in which opposing a party’s use of force would not result in opposition to its military objective. Though it cannot be said definitively whether any such circumstances exist, it bears reaffirming that neutral organizations are always free to advocate generally for the non-violent resolution of disputes.

#### IV. How Do Organizations Decide When to Speak Out?

Public debate on the use of force often takes place through the lens of “humanitarian intervention” or the “Responsibility to Protect,” a normative framework endorsed by the U.N. General Assembly<sup>50</sup> and since elaborated by the U.N. Secretary General and his Special Representative on the Prevention of Genocide and the Responsibility to Protect.<sup>51</sup> A detailed treatment of this debate is beyond the scope of this article, but it is essential to note the frequent appeal by proponents and opponents of the use of force to humanitarian principles (in particular, the principle of humanity) and the aims of the U.N. Charter (in particular, “fundamental human rights”).<sup>52</sup> It is common for states purporting to act in self-defense, or in the interests of collective security, to claim that the use of force will serve humanitarian interests. It is equally common for peace movements to oppose the use of force on humanitarian grounds. The moral

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It is understood that in denouncing violations the ICRC is simply stating publicly a set of facts, such as “a hospital, which has special protection under IHL, was bombed by x party, on y date, resulting in z number of casualties.” These requirements may prove helpful by way of analogy in assessing whether there are any circumstances in which a humanitarian organization may adopt a public position on the use of force *ad bellum*.

<sup>48</sup> For discussion of these critiques, and responses to them, See Jakob Kellenberger, *Speaking Out or Remaining Silent in Humanitarian Work*, 86 International Review of the Red Cross (2004); Rony Brauman, *Médecins Sans Frontières and the ICRC: Matters of Principle*, 94 International Review of the Red Cross (2012); Plattner, *supra* note 33, at 4.

<sup>49</sup> Jakob Kellenberger, *supra* note 48, at 601.

<sup>50</sup> G.A. Res. 2005 World Summit Outcome A/RES/60/1, para. 138-140 (Oct. 24, 2005).

<sup>51</sup> The three pillars of the responsibility to protect assert that (1) the state bears the primary responsibility for protecting their populations; (2) the international community has a responsibility to encourage and assist states in fulfilling this responsibility; and (3) the international community has a responsibility use appropriate diplomatic, humanitarian and other means to protect the civilian population. In the event a state is clearly failing to protect its population, the international community is called upon to take collective action to protect the population, in accordance with the UN Charter. U.N. Secretary-General, Implementing the Responsibility to Protect, U.N. Doc. A/63/677 (Jan. 12, 2009).

<sup>52</sup> In the case of the 2003 invasion of Iraq, See *Full Text: Tony Blair’s Speech*, The Guardian (18 Mar. 2003) available at <http://www.theguardian.com/politics/2003/mar/18/foreignpolicy.iraq1>; See also *War With Iraq: Take 2*, Friends Committee on National Legislation, February, 2003, available at [http://fcn.org/resources/newsletter/feb03/war\\_with\\_iraq\\_\\_take\\_2](http://fcn.org/resources/newsletter/feb03/war_with_iraq__take_2).

force of humanitarianism as a political, if not legal, rationale for or against the use of force is strong. Given their allegiance to humanitarian principles and their presence on the ground in conflict areas, humanitarian organizations are ideally placed to shape these debates should they choose to do so.

As discussed earlier, humanitarian organizations rarely make or criticize calls to arms.<sup>53</sup> Each organization appropriately makes its own decision on whether to speak out or not based on its own specific commitments, circumstances, and analysis; some factors, however, should be common to most organizations' decision-making processes. What follows is a non-exhaustive list of factors that organizations should, and in some cases may, consider when deciding whether or not to adopt a public position vis-à-vis the proposed use of force.

### **A. Humanitarian Principles**

As discussed, the principle of humanity should compel humanitarian organizations to attempt to reduce or prevent suffering wherever and however they can; this includes attempting to influence consequential policy decisions for the civilian population. Organizations that take a rights-based approach may be particularly compelled to speak out. However, the principle of neutrality may severely limit what organizations that subscribe to it can say. Each organization must individually consider its commitment to and interpretation of the humanitarian principles.

### **B. Balance of Harms**

In connection to an organization's commitment to the principle of humanity, they must consider whether the use of force is likely to create or reduce suffering. This is a challenging assessment to make, and it is made even more challenging by the need to consider all the indirect consequences of the conflict and its variable impacts based on age, gender, ethnicity, and a host of other factors. Organizations will generally refrain from speaking out unless they have a high degree of confidence in their analysis on this central and extremely difficult issue.

### **C. Legality**

Humanitarian organizations may, but need not, believe that strengthening compliance with the international law on the use of force, known as the *jus ad bellum*, generally reduces suffering and protects civilians by ensuring a stable and regulated system of peace and collective security. The *jus ad bellum* is reflected in the United Nations Charter.<sup>54</sup> The general prohibition against "the threat or use of force against the territorial integrity and political independence of another state," expressed in Article 2(4), has been confirmed as a rule of customary international law by the

<sup>53</sup> Oxfam has notably spoken out on the use of force on a number of occasions, such as support for intervention in Rwanda (1994) and Liberia (2003) and opposition in Iraq (2003) and Syria (2013). See Edmund Cairns, *R2P and Humanitarian Action*, Global Responsibility to Protect, 6 (2014); See also *Working Toward Peace in Syria: Answers to Your Questions*, Oxfam, (5 Sep. 2013), available at <http://www.oxfamamerica.org/explore/stories/working-toward-peace-in-syria-answers-to-your-questions>.

<sup>54</sup> This is distinct from international humanitarian law, or the *jus in bello*, which regulates the use of force during armed conflict. The *jus ad bellum* concerns the legality of the recourse to force, while the *jus in bello* regulates the legality of the actions of the belligerents during a conflict, irrespective of whether the initial recourse to force was legal.

International Court of Justice and is believed by some scholars to have risen to the level of a *jus cogens* rule.<sup>55</sup> The U.N. Charter also lays out exceptions to the general prohibition. Article 51 states that nothing in the Charter impairs the right of states to individual or collective self-defense, and Chapter VII gives the U.N. Security Council the right to authorize military measures in order to restore international peace and security.<sup>56</sup> Some scholars contend that the use of force to prevent or mitigate a humanitarian crisis may be lawful even absent Security Council authorization or a self-defense rationale;<sup>57</sup> while this is certainly the minority view, it again demonstrates the appeal of humanitarian rhetoric in use of force debates.

Due to their privileged status under IHL, as well as the protective and supportive provisions of that framework, along with international human rights law and international refugee law, humanitarian NGOs have an additional incentive to ensure respect for international law generally, even though they are not bound by it. Bearing in mind the contentious legal debate that often surrounds the use of force, it is useful to consider how organizations might view cases where the question of legality is more or less settled.

When the use of force is clearly unlawful, organizations will generally be inclined to oppose it, since most unlawful uses of force will cause civilian suffering for no legitimate purpose. When the purpose of the proposed action is humanitarian in nature (and a humanitarian organization agrees that the action would indeed be appropriate if authorized by the Security Council) the organization faces a difficult dilemma. In such instances, organizations are forced to choose between opposing an illegal use of force, supporting an “illegal but legitimate” action,<sup>58</sup> or adopting the view that a *bona fide* humanitarian intervention – which under certain circumstances requires no Security Council authorization – in situations like this, silence is, of course, an attractive option.

When the use of force is clearly lawful *and* aims to protect civilians, organizations may consider supporting it. Organizations will face a difficult dilemma, however, if they believe that a lawful use of force will cause extraordinary civilian harm while reducing little. Humanitarian organizations have a duty to prevent the suffering of innocent populations, but opposing the use of force in a case like this would require them to assess the gravity and significance of a state’s self-defense interest or the international community’s collective security interest, which they are

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<sup>55</sup> U.N. Charter, Art. 2(4). See, e.g., *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits), I.C.J. Reports 187-190 (27 June 1986); *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits) (Separate opinion of Judge Singh), I.C.J. Reports 153 (27 June 1986). A *jus cogens* rule is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” See also Art. 54, Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331.

<sup>56</sup> See U.N. Charter, arts. 39-51.

<sup>57</sup> See, e.g., Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, Humanitarian Intervention: Ethical, Legal and Political Dilemmas (2003).

<sup>58</sup> The Kosovo Report, presented to UN Secretary-General Kofi Annan, concluded that NATO’s air campaign in Kosovo was “illegal but legitimate.” See *The Kosovo Report: Conflict, International Response, Lessons Learned*, Independent International Commission on Kosovo, Oxford, (2000), available at <http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf>.

poorly positioned to do (unless the collective security interest, as announced by the Security Council, is related to civilian protection).

#### **D. Views of the Affected Population**

The Inter-Agency Steering Committee (“IASC”), a coordinating body for the U.N.-led humanitarian system that includes some major international humanitarian NGOs, confirmed in 2011 that humanitarian organizations should hold themselves accountable to affected populations (“AAP”), an attitude widely held in the humanitarian community.<sup>59</sup> One of the IASC’s five AAP commitments, on “participation,” states that humanitarians should “enable affected populations to play an active role in the decision-making processes that affect them.”<sup>60</sup> As it relates to the topic at hand, this means that humanitarians have committed to ensure that affected populations are able to influence the organization’s position concerning whether or not force should be used. Some humanitarians may view the AAP commitments as a requirement to also incorporate the views of affected populations into their own advocacy efforts.

In practice, incorporating affected voices into the debate on the use of force is extraordinarily difficult. Affected populations are composed of individuals with different opinions whose views are shaped by their unique experiences and intersectional identities, meaning that general consensus in an affected population is rare. Attempting to conclude whether the population supports or opposes the use of force requires humanitarian organizations to define who is most vulnerable and affected at the time the decision to use force is made, as well as who would be most vulnerable and affected in the future if force is used or not used. All of this assumes that humanitarian organizations have the capacity and access to ask persons across all or most of an affected area, which they often do not. None of these limitations should inhibit an organization from making its best effort to understand and be faithful to local opinion, but organizations should take care to not to express a view on the use of force if they do not have a decent understanding of what the affected people want.

#### **E. Objectives of the Use of Force**

Though the term “humanitarian intervention” is used commonly to describe military actions against oppressive states, a military operation that actually conforms to the principle of humanity and the humanitarian imperative must be narrowly tailored to preventing or relieving suffering and must also be carried out in concert with non-military measures designed to maximize the protection of and relief for civilians. For purposes of this article, it must be noted that principled humanitarian organizations will be reluctant to vocally support the use of force when its principal stated objective is not directly related to protection of civilians or the relief of civilian suffering. Conversely, humanitarian organizations will be more likely to vocally oppose the use of force when the stated military objective is inherently criminal, such as the killing or forcible displacement of a civilian population.

<sup>59</sup> *Accountability to Affected Populations: IASC Commitments (CAAP)*, The AAP Operational Framework, 11, available at <http://www.humanitarianinfo.org/iasc/downloaddoc.aspx?docID=6632&type=pdf>

<sup>60</sup> *Id.*



Complicating the equation is the fact that parties to armed conflict nearly always have mixed motives for engaging in hostilities and rarely explicate them completely. Self-defense actions may well be partially motivated by humanitarian concerns for foreign populations; just as U.N. peacekeeping missions whose central mandate is the protection of civilians.<sup>61</sup> Humanitarian organizations must take care to analyze the interests of all the parties involved in order to determine the objective that military force is actually intended to achieve.

## **F. Precautionary and Limiting Principles**

A number of the factors considered thus far, from a humanitarian organization's point of view, are related to the criteria outlined for the just use of force in the report of the *International Commission on Intervention on State Sovereignty* (ICISS Report).<sup>62</sup> If the above criteria is met in the affirmative, in other words, the use of force in a given situation would be legal so long as it was narrowly tailored to humanitarian objective, (related to the ICISS criterion of "right intention"), desired by the population (also discussed under "right intention"), and likely to reduce harm (related to "reasonable prospects"). The criteria should be considered together as limiting and precautionary principles.

According to ICISS, the use of force is only appropriate in response to:

- large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.<sup>63</sup>

The scale and gravity requirement, which ICISS refers to as "just cause," is a threshold condition. Humanitarian organizations generally should not support the use of force in response to a situation less dire than those described above.

Humanitarian organizations will also be interested in whether the proposed use of force would be proportional and whether there are any peaceful alternatives to fighting that might reasonably succeed in achieving the humanitarian objective exist (these are the two remaining requirements contained in the ICISS Report).

## **G. Operational Consequences and Potential Impact**

Speaking out on the use of force, even for non-neutral humanitarian organizations, may put at risk the trust of local populations as well as the parties to the armed conflict – and their trust is necessary in order to operate impartially and effectively. Equally important, is the safety of the organization's staff and the staff of its local partner organizations, which can also be

<sup>61</sup> The Report of the International Commission on Intervention and State Sovereignty suggest that the motives behind unilateral military operations should be viewed with more skepticism than multilateral operations. *See The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, Canadian Ministry of Foreign Affairs, 36 (2001).

<sup>62</sup> *Id.* The full list of threshold criteria are: just cause; right intention; last resort; proportional means; reasonable prospects; and right authority.

<sup>63</sup> *Id.*

compromised as a result of the organization speaking out on the use of force. Organizations must compare the impact they believe they can achieve by speaking out to the risks they would create for their staff, partners, and programs, as well as the populations they seek to assist. Each organization should make its decision to speak out based on its tolerance for risk and the value it places on advocacy versus programming.

## **V. Conclusion**

Humanitarian organizations are guided by a host of legal, policy, and operational considerations; many which seem to militate against taking public positions on the use of force. Notwithstanding these apparent restrictions, humanitarian organization may sometimes consider it appropriate to publicly voice their support for, or opposition to, the use of force. NGOs are essentially free from legal obligation in making this determination, and the weight they assign to various factors will (and must) be unique to each organization; and will likely be guided by the organization's humanitarian commitments, values, and best judgment.